HOPKINS, COLLECTOR OF INTERNAL REVENUE, *v.* BACON.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 84. Argued October 22, 1930.—Decided November 24, 1930.

The interest of a wife in community property in the State of Texas is properly characterized as a present vested interest, equal and equivalent to that of her husband; and under §§ 210 (a) and 211 (a) of the Revenue Act of 1926, she and her husband are entitled to make separate returns, each of one-half of the community income. Following *Poe* v. *Seaborn, q. v., ante,* p. 101. P. 125. 38 F. (2d) 651, affirmed.

CERTIORARI, 281 U. S. 715, to review a judgment of the Circuit Court of Appeals affirming a judgment of the District Court, 27 F. (2d) 140, for the taxpayer in an action to recover from the Collector of Internal Revenue an amount paid under protest on account of income taxes for 1927. See statement in *Poe* v. *Seaborn, ante,* p. 101.

Solicitor General Thacher, with whom *Assistant Attorney General Youngquist, Mr. Sewall Key, Miss Helen R. Carloss,* Special Assistants to the Attorney General, *Mr. Erwin N. Griswold,* and *Messrs. Clarence M. Charest,* General Counsel, and *T. H. Lewis, Jr.,* Special Attorney, Bureau of Internal Revenue, were on the brief, for Hopkins, Collector of Internal Revenue.

Under the laws and judicial decisions of the State of Texas, the husband's interest in the community income during coverture is such that he should properly be required to report the entire amount in his return; the wife's interest is not such that she should be permitted to report one-half of the community income in her return. Texas Rev. Civ. Stats., Arts. 4619, 4620, 4621, 4623, 4634, 4635, 4638; *Moody* v. *Smoot,* 78 Tex. 119; *Stramler* v. *Coe,* 15 Tex. 211; *Coss* v. *Coss,* 207 S. W. 127; *Bell* v. *Crabb,* 244 S. W. 371; *Jordan* v. *Moore,* 65 Tex. 363; *Rowlett* v. *Mitchell,* 52 Tex. Civ. App. 589; *Briggs* v. *McBride,* 190 S. W. 1123; *Wiener* v. *Zweib,* 105 Tex. 262; *First Nat. Bank* v. *Davis,* 5 S. W. (2d) 753; *Dallas Plumbing Co.* v. *Harrington,* 275 S. W. 190; *Shaw* v. *Shaw,* 28 S. W. (2d) 173; *Martin* v. *McAllister,* 94 Tex. 567; *Ochoa* v. *Edwards,* 189 S. W. 1022, writ of error refused, 190 S. W. xv; *Braden* v. *Gose,* 57 Tex. 37; *Seabrook* v. *First Nat. Bank,* 171 S. W. 247; *Fullerton* v. *Doyle,* 18 Tex. 3; *Wright* v. *Hays,* 10 Tex. 130; *Zimpelman* v. *Robb,* 53 Tex. 274; *Hamlett* v. *Coates,* 182 S. W. 1144, writ of error refused, 190 S. W. xv; *Davis* v. *Davis,* 186 S. W. 775; *Hedtke* v. *Hedtke,* 112 Tex. 404; *Strickland* v. *Strickland,* 276 S. W. 795; *Moor* v. *Moor,* 24 Tex. Civ. App. 150, writ of error refused, 58 S. W. xv; *Gonzales* v. *Gonzales,* 117 Tex. 183; *Martin* v. *Martin,* 17 S. W. (2d) 789.

Messrs. Harry C. Weeks and *Palmer Hutcheson,* with whom *Messrs. Rhodes S. Baker* and *R. C. Fulbright* were on the brief, for Bacon.

Under the constitution and laws of Texas and the decisions of its highest courts, community income belongs jointly and equally to husband and wife. All acquisitions of either husband or wife during marriage, whenever or however derived, are the common and equal property of both of them, except such acquisitions as came through

"gift, devise or descent," and except the "increase" of lands so derived (that is, derived through "gift, devise or descent") and increase of lands owned at marriage or acquired subsequent to marriage through "gift, devise or descent." Texas Stats., Arts. 4613, 4614, 4619; *Arnold* v. *Leonard,* 114 Tex. 535.

It is obvious that neither husband nor wife can have any incomes other than their community incomes, except such rare gains as are "increase" of lands. Legislative attempts to enlarge the wife's separate income have been held unconstitutional by the highest courts of Texas. *Arnold* v. *Leonard, supra; Northern Texas Traction Co.* v. *Hill,* 297 S. W. 778; *Teague* v. *Fairchild,* 15 S. W. (2d) 585.

The wife has in the community income such ownership and substantial rights as authorize her under the Revenue Act, separately to return and be taxed upon her share thereof. Texas Stats., Arts. 2578, 2579, 4613, 4614, 4616, 4617, 4620, 8281, 8282; *Warburton* v. *White,* 176 U. S. 484; *Arnett* v. *Reade,* 220 U. S. 311; *Atkins* v. *Davis,* 291 S. W. 968; *Arnold* v. *Leonard,* 114 Tex. 535; *In re Gutierrez,* 33 F. (2d) 987; *Gohlman, Lester & Co.* v. *Whittle,* 114 Tex. 548; *Tannehill* v. *Tannehill,* 171 S. W. 1050; *Taylor* v. *Murphy,* 50 Tex. 291; *Stramler* v. *Coe,* 15 Tex. 211; *Wright* v. *Hays,* 10 Tex. 129; *Zimpleman* v. *Robb,* 53 Tex. 274; *Martin* v. *Moran,* 32 S. W. 904; *Krenz* v. *Strohmeir,* 177 S. W. 178; *Watson* v. *Harris,* 130 S. W. 237; *Coss* v. *Coss,* 207 S. W. 127; *Bicocchi* v. *Casey Swasey Co.,* 91 Tex. 259; *Vercelli* v. *Provenzano,* 28 S. W. (2d) 316; *Gardenshire* v. *Gardenshire,* 172 S. W. 726; *Shaw* v. *Shaw,* 111 S. W. 223; *Dority* v. *Dority,* 96 Tex. 215; *Miller* v. *Miller,* 285 S. W. 837; *Lamar & Smith* v. *Stroud,* 5 S. W. (2d) 824; *Furrh* v. *Winston,* 66 Tex. 521; *Rice* v. *Rice,* 21 Tex. 58; *Maddox* v. *Summerlin,* 92 Tex. 483; *Pellum* v. *Fleming,* 283 S. W. 531, writ of error denied, 287 S. W. 492; *Rowlett* v. *Mitchell,* 114 S. W. 845; *Red River*

Nat. Bank v. *Ferguson,* 109 Tex. 287; Speer's Law of Marital Rights in Texas, 3d ed., pars. 504, 505.

Either spouse may devise during his or her lifetime one-half of the community property. Texas Stat., Arts. 8281–8282; *Parker* v. *Parker,* 10 Tex. 83; *Brown* v. *Pridgen,* 56 Tex. 124; *Moss* v. *Helsley,* 60 Tex. 426; *Rogers* v. *Trevathan,* 67 Tex. 406. The share of each at death is identical. Texas Stat., Arts. 2578–2579; *McCowan* v. *Owens,* 40 S. W. 336; *Clemons* v. *Clemons,* 45 S. W. 199; *Edwards* v. *White,* 120 S. W. 914, 916. The wife's interest, or the interest of her heirs, differs in no wise from that of the husband or his heirs.

Mr. Justice Roberts delivered the opinion of the Court.

This case comes here on writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. It involves the same questions with respect to community income under Texas law as are involved in *Poe* v. *Seaborn, ante,* p. 101, and *Goodell* v. *Koch, ante,* p. 118, under the law of Arizona and Washington.

Respondent was assessed additional income tax for 1927, because he and his wife had made separate returns and had each returned one-half of the community income, whereas the Commissioner of Internal Revenue asserted that the respondent must return the whole thereof. Respondent paid under protest, brought suit in the District Court (27 Fed. (2d) 140) and recovered judgment. The collector appealed and the Circuit Court of Appeals affirmed the judgment. (38 Fed. (2d) 651.)

In view of our decision in *Poe* v. *Seaborn, supra,* the only matter to be examined here is whether under the community property system of Texas the wife has a mere expectancy, as she would under the law of California (cf. *United States* v. *Robbins,* 269 U. S. 315), or on the contrary has a proprietary vested interest in the community

property such as makes her an owner of one-half of the community income.

The statutes contain sweeping provisions as to what shall be included in community property. They provide that each spouse shall have testamentary power over his or her respective interest in the community property. In the event of failure to exercise such testamentary power they provide that the property shall go in the first instance to the descendants of the deceased spouse. They provide, as is usual in States having the community system, that the husband shall have power of management and control such that he may deal with community property very much as if it were his own. In spite of this, however, it is settled that in Texas the wife has a present vested interest in such property (*Arnold* v. *Leonard,* 114 Tex. 535). Her interest is said to be equal to the husband's (*Wright* v. *Hays' Administrator,* 10 Tex. 130). It is held that the spouses' rights of property in the effects of the community are perfectly equivalent to each other (*Arnold* v. *Leonard, supra*). These expressions as to the wife's interest are confirmed by the authorities holding that if the husband, as agent of the community, acts in fraud of the wife's rights, she is not without remedy in the courts. (*Stramler* v. *Coe,* 15 Tex. 211; *Martin* v. *Moran,* 32 S. W. 904; *Watson* v. *Harris,* 130 S. W. 237; *Davis* v. *Davis,* 186 S. W. 775.)

The applicable statutory provisions are noted in the margin.*

In view of what has been said in *Poe* v. *Seaborn, supra,* it remains only to say that the interest of a wife in community property in Texas is properly characterized as a

* Revised Civil Statutes, Texas, 1925, Vols. I, II, Articles 1299–1300; 1983–1985; 2578–2579; 3661–3664; 3666–3670; 3672–3678; 3680–3681; 4613–4627; 4634–4635; 4638. Texas General and Special Laws, Reg. Sess. 1927, Chap. 148.

present vested interest, equal and equivalent to that of her husband, and that one-half of the community income is therefore income of the wife. She and her husband are entitled to make separate returns, each of one-half of such income. The judgment of the Circuit Court of Appeals is *Affirmed.*

The CHIEF JUSTICE and MR. JUSTICE STONE took no part in the consideration or decision of this case.